

U.S. DEPARTMENT OF TRANSPORTATION  
OFFICE OF THE SECRETARY

In re:	)	
	)	
Drug and Alcohol Management	)	
Information System (MIS) Data	)	
Collection Form	)	Docket OST-2002-13435
	)	
Appendix H	)	
49 CFR Part 40	)	

**COMMENTS OF THE  
AIR TRANSPORT ASSOCIATION OF AMERICA, INC.**

The Air Transport Association of America, Inc. (“ATA”) submits these comments in response to the Notice of Proposed Rulemaking to revise the Data Collection Form used by regulated entities to submit drug and alcohol testing information. 67 Fed. Reg. 61306 (September 30, 2002) (the “NPRM” or “proposed rule”).

ATA appreciates the opportunity to comment on the proposed rule. ATA member airlines<sup>1</sup> account for more than 95% of domestic passenger and cargo traffic, and more than 76% of all U.S. commercial aircraft departures annually. In 2001, ATA member airlines had more than 200,000 employees who were subject to mandatory drug and alcohol testing. ATA members conducted more than 90,000 drug tests and more than 28,000 alcohol tests under DOT’s procedures in 2001. Consequently, ATA member airlines have a significant interest in this rulemaking. When promulgated, the final rule will have a direct, immediate and significant economic and operational impact on ATA member airlines.

With certain exceptions, ATA opposes this NPRM and recommends that DOT commence a negotiated rulemaking or establish a partnership with industry by creating an advisory committee under the Federal Advisory Committee Act to revise the reporting form for drug and alcohol testing data (the “MIS Form”). Alternatively, we recommend that the Federal Aviation Administration (FAA) be exempted from this rulemaking and, instead, that FAA be authorized to work with the airline industry to create a new MIS Form for airlines. We make these alternative recommendations because not only does the

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<sup>1</sup> Members are: Airborne Express, Alaska Airlines, Aloha Airlines, America West Airlines, American Airlines, American Trans Air, Atlas Air, Continental Airlines, Delta Air Lines, DHL Airways, Emery Worldwide, Evergreen International Airlines, Federal Express, Hawaiian Airlines, JetBlue Airways, Midwest Express Airlines, Northwest Airlines, Polar Air Cargo, Southwest Airlines, United Airlines, United Parcel Service, and US Airways. Associate members are: Aerovias de Mexico, Air Canada, Air Jamaica, KLM-Royal Dutch Airlines, and Mexicana de Aviacion.

proposed new form ***not streamline*** reporting for airlines, it ***adds new and complex requirements*** that will increase program implementation costs for airlines, and it will increase the costs of reporting drug and alcohol testing results. At the end of the day, at least for airlines, the NPRM is change for change's sake without a qualitative or quantitative benefit. Promoting uniformity among DOT Operating Administrations does not justify this particular rule.

1. The Proposed Form Increases the Administrative Burden. The proposed new MIS form is one page and on its face appears to reduce the burden of reporting results. However, this is not the case for airlines because the new form would also require a separate page for each employee group. Because airlines have six to eight separate categories of covered employees who are tested, airlines would have to prepare and submit six to eight pages. ***This compares to just three pages using the current form and format.*** Thus, for airlines, the reporting would not be streamlined; it would become more complicated and more burdensome. For this reason alone, the NPRM offers no administrative improvement.

Furthermore, the proposed change will add complexity and make it more difficult for the FAA as well. The current form and format already are streamlined and easy to read, providing FAA with a complete picture of an airline's drug and alcohol testing program. For example, it allows FAA to determine from one page the total number of random tests conducted by a given airline; the new form and format will require FAA to go through several pages to add up the numbers for each covered class and then add them together to get the total count. These benefits will be lost by converting to the proposed new form and format, and the chances for errors will increase because the information for all employee categories will not be available in grid format and because more, not fewer, pages will be involved.

2. New Data Requirements Adds Complexity and Cost. Among other things, the proposed new form would require employers to track data related to specific types of refusals (rather than the total number, which is currently reported), and the number of canceled tests.<sup>2</sup> These new requirements are more than a mere reporting requirement. Because this is data that is not presently collected, considerable costs would be incurred to begin capturing this data, including training for MROs, labs and program staff, and even more importantly, programming computer systems required to record and report this new information. We estimate that these changes will result in total one-time costs of \$250,000 - \$500,000 for U.S. airlines. At a time when U.S. airlines have reported third quarter 2002 losses of more than \$2 Billion, and expect full year 2002 losses in excess of \$9 Billion, a \$250,000 cost (or more) with no discernable benefit is not acceptable.

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<sup>2</sup> The NPRM notes that canceled tests do not count towards meeting an employer's required number of random tests because of § 40.207(b). We believe this provision should be revised and canceled tests should count towards random testing goals. Notwithstanding the cancellation of the result, the employee was selected randomly, reported for a test and provided a specimen. Both employer and employee participated in a testing event and it should be counted. That the result cannot be used due to a fatal flaw does not undermine the deterrent effect of having executed the testing process, which is the principal goal of random testing. Not counting canceled tests promotes bureaucratic technicalities over substance.

3. The Number of Covered Employees Should be Established at the Start of Each Year. Under the NPRM, the number of covered employees reported on the MIS Form is determined at the *end* of each year. This would be done by determining the number of covered employees in each random testing selection period and then dividing by the number of selection periods. This process is unnecessarily complicated, creates uncertainty about compliance, and dramatically increases the administrative burden on airlines.

In companies like major airlines, which have tens of thousands of covered employees subject to random testing,<sup>3</sup> efficient administration is critical to the effective implementation of these testing programs. For this reason, ATA members have consistently determined the number of covered employees at the start of each year. This number then drives the selection process for each testing period. In this fashion, ATA's members can manage the testing process to ensure that appropriate numbers of employees are selected and tested in each testing period. This also allows the airlines to determine – on a going forward basis – if adjustments are needed so that, at the end of the year, each airline conducts the requisite number of random tests.

In contrast, the proposed system looks back from the end of the year to determine the number of covered employees. This concept has several deficiencies. First, airlines and other employers will not know until after the end of the year if they have tested the right number of employees. If an airline will miss its mark – either over or under, there is no way to know that an adjustment is required. This could result in an airline testing too many or too few employees, and possibly subject the airline to enforcement action.

Second, the only way to avoid this problem would be for employers to determine the number of covered employees at the start of each selection period, and then adjust the selection rate for that period depending on the outcome of the prior period. But even this is not possible because the list of selected employees for the current month is drawn before the test results for the previous month are available. Any effort to overcome these practical realities would be a significant administrative burden, particularly for many of ATA's members because most airlines select monthly, not quarterly. Airline systems are not set up to make an employee count each month (or quarter), and to do so would require extensive programming and systems changes.

Third, such a system would be complex and unnecessarily complicated. Rather than a simple and easily understood administrative process, the NPRM proposes a complicated process that would cause confusion and administrative errors. As with the other proposed changes, the NPRM does not articulate a rationale for this nor does it provide an adequate benefit-cost analysis.

In lieu of this complicated, expensive process, ATA recommends that the number of covered employees be determined at the beginning of each year. As noted, this is

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<sup>3</sup> In 2001, for example, American Airlines had more than 47,000 covered employees, United Airlines had nearly 47,000 covered employees, and Delta Air Lines had nearly 40,000 covered employees.

administratively efficient and allows employers to ensure they conduct the requisite number of random tests. Also, it would avoid the cost, complexity and administrative burden of the system proposed in the NPRM.

4. ATA Supports Eliminating Data Elements. The NPRM notes that FAA proposes to eliminate capturing certain data elements. 67 Fed. Reg. at 61307. ATA supports elimination of the identified data elements. The information is available to FAA at inspections. In particular, we support not having to enter "0" in data fields.

Respectfully submitted,

AIR TRANSPORT ASSOCIATION OF AMERICA, INC.

A handwritten signature in black ink, reading "D. A. Berg", written over a horizontal line.

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